Judicial activism and restraint in the creation of the International Judicial Function

IMPACT PARAGRAPH

Social relevance of the research

Just as decision-making before any court cannot be seen as the result of a mathematical equation (a sort of one plus one deliberation that as we see in Chapter 2 is propagated by legal formalists), considering the societal relevance of a heavily theoretical question places shackles on the true nature of such a piece of research. In that regard, theoretical questions that require extensive analysis of the interrelationship between theory and practice can only yield theoretical answers. The social relevance of this thesis therefore lies within the capacity of any reader to appreciate how an analysis regarding the effect upon the judicial function of judicial activism and judicial restraint can only be limited and understood within these legal theoretical limitations that the author of the research has set.

One observation that is made at the Introduction in this thesis is that international law has largely been understood, for most of its existence, without its judicial component. As a result, doctrinal analysis from international legal scholarship addressing the emergence and evaluation of international courts and tribunals has been able to expand only in recent decades, giving rise to a gradual yet limited development of legal theories and studies over the effects of a judicial element in public international law. On the other hand, judicial activism and judicial restraint are also two concepts emerging from the practice of national courts and have, over the final part of the last century, gradually appeared as elements forming part of the judicial process yet have not been presented as components of its formation. The lack of any analysis of the effects of activism and restraint upon the function itself is stark, especially given their importance in the hands of the judiciary.

As such, this thesis aims at bridging these two observations together, to bring about an examination of the international judicial decision-making that has been little evaluated or analysed by international legal scholars. To do this, the thesis engages in a multi-level analysis of international adjudication, starting from its very basic and fundamental legal theory and moving on to evaluating the practice of these institutions in order to consider how activism and restraint have in turn affected the international judiciary as an institution. In that regard, there are multiple levels of this analysis that can provide food for thought across different areas of the discipline, in particular to legal theorists and scholars.

It follows that this thesis aspires to help the continuous evolution of the academic debate regarding the international judicial function as an institution in itself, without the political components that are attached to each such judicial or quasi-judicial organ in the international legal system. Beyond this academic relevance, this thesis also addresses questions as to the nature of the international legal system as a legal system *eo ipso* and as part of the social dialogue within which international lawyers and practitioners act and the policy decisions that are taken in order to create such judicial institutions. Effectively, the direct relationship and its aims between the judicial institutions and their objectives is a line waiting to be drawn, and the author of this thesis hopes to add one of the strings connecting the two together.

Furthermore, as the preparation of this thesis has proven, this thesis also provides for the opportunity of such international judicial institutions to self-criticise and carry out evaluations as to the directions they have been taking with their decisions and to what aims. It allows for a social debate over how the international judicial function has essentially been left at its own device,

allowing for critics of this legal system to be able to use arguments such as 'the fragmentation of international law' and discredit the usefulness and strength of public international law both as a doctrinal concept but also, most importantly, as a legal system to be abided by.

Target Groups

The main target group of this research is, without a doubt, international law researchers whose interests lie primarily in the works of international courts and tribunals within overall scheme of the international legal system. The analysis however may also be of interest to general international law scholars, those examining the nature of the international legal system overall, and those addressing questions of hierarchy of norms or the fragmentation of international law, as this research provides for a means by which these subjects can be academically expanded upon or possibly even reconsidered. This research can also be helpful to students who aim to better understand the machinery of the international legal system and one of its important components, namely, the international judiciary.

The questions asked and the results of this research may also be of particular interest to members of the international judiciary themselves, in particular during their deliberations in cases before them or in general as part of understanding their role within the legal system and how fundamental their decisions are. This may help them determine what piece of the puzzle of the judicial function they themselves wish to add. In this same vein, this can also be an enlightening read to the public servants working behind these judges and those working within these international institutions, to provide both incentives and inspiration as to the nature of the work they are doing and its importance in the dialogue regarding the international judiciary in modern international law.

Finally, such a research can also be use of policy makers and governmental officials that form part of negotiations for the creation of international judicial institutions, in particular those who are part of the drafting of international agreements or constituent treaties that construct such judicial organs. Undoubtedly, understanding the theoretical backdrop to any work undertaken allows for better appreciation of what needs to be addressed in such agreements and treaties.

Innovation

As noted under 'Social relevance' above, the aims of this thesis are to introduce a new element to the scholarly dialogue regarding international judicial institutions, namely that of the effect of activism and restraint coupled with the evolution of the judicial function through the decision-making of the international courts and tribunals. As we shall see in the Introductory Chapter to this thesis, literature on the subject matter of judicial activism and restraint at the international level is scarce, and even less so when the judicial function element is also considered. Most importantly, as far as the author's research capabilities can reach and with the exception of one academic author that was identified, literature addressing a multi-jurisdictional approach to judicial activism and restraint is inexistent. The present thesis therefore presents an effectively novel evaluation of both the creation of the judicial function at international level and judicial activism and restraint at a multi-jurisdictional level. In essence, the author hopes to be able to commence an academic debate through the discussion that takes place within this thesis, where the creation of the international judicial function through a variety of different tools and elements available forms an essential component.

Implementation

The author of this thesis hopes disseminate the research carried out for the purposes of this thesis through the publication of a book or within academic journals, in order to include it as part of the academic dialogue regarding its subject matter. Beyond this, in order to be able to reach out to particular parts of the target audience, the author hopes to be able to take part in conferences or engage in the growingly new forms of media such as blogs in order to further spark new discussions from this research but also to raise awareness as to its existence amongst the international judiciary and policy-makers.